

1 THE HONORABLE THOMAS S. ZILLY
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

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12 JOE CALLAN, Individually and on Behalf of) No. 2:11-cv-01340-TSZ
13 All Others Similarly Situated,)
14 Plaintiff,) CLASS ACTION
15 vs.) THE MOSCO/HARDY GROUP'S MOTION
16 MOTRICITY, INC., et al.,) FOR CONSOLIDATION, APPOINTMENT
17 Defendants.) AS LEAD PLAINTIFF AND APPROVAL
18) OF SELECTION OF COUNSEL
19) [NOTE ON MOTION CALENDAR:
20 October 28, 2011]
21)
22 MARK COUCH, Individually and on Behalf of) No. 2:11-cv-01678
23 All Others Similarly Situated,)
24 Plaintiff,) CLASS ACTION
25 vs.) [ORAL ARGUMENT REQUESTED]
26 MOTRICITY, INC., et al.,)
27 Defendants.)
28

1 Class members Cliff Mosco and Rich Hardy (together, the “Mosco/Hardy Group” or
 2 “Movant”) will, and hereby does, move this Court for an order: (1) consolidating the related actions
 3 pursuant to Fed. R. Civ. P. 42(a); (2) appointing the Mosco/Hardy Group as lead plaintiff in the
 4 above-captioned actions pursuant to the Private Securities Litigation Reform Act of 1995
 5 (“PSLRA”), 15 U.S.C. §78u-4; and (3) approving its selection of Robbins Geller Rudman & Dowd
 6 LLP (“Robbins Geller”) as Lead Counsel and Hagens Berman Sobol Shapiro LLP (“Hagens
 7 Berman”) as liaison counsel pursuant to the PSLRA.

8 This Motion is brought on the grounds that Movant meets the requirement of Rule 23 of the
 9 Federal Rules of Civil Procedure (“Rule 23”) because its claims are typical of the class and it will
 10 fairly and adequately represent the class. Movant also seeks approval of its choice of lead counsel.

11 **I. INTRODUCTION**

12 Presently pending in this Court are two securities class action lawsuits (the “Related
 13 Actions”) brought on behalf of all persons who purchased or otherwise acquired the publicly-traded
 14 securities of Motricity, Inc. (“Motricity” or the “Company”) between June 18, 2010 and August 9,
 15 2011 (the “Class Period”):

CASE NAME	CASE NUMBER	DATE FILED
<i>Callan v. Motricity, Inc., et al.</i>	2:11-cv-01340-TSZ	August 12, 2010
<i>Couch v. Motricity, Inc., et al.</i>	2:11-cv-01678-UA	October 7, 2011

19 These Related Actions are brought pursuant to §§11, 12(a)(2) and 15 of the Securities Act of
 20 1933 (“Securities Act”), §§10(b) and 20(a) of the Securities Exchange Act of 1934 (“Exchange
 21 Act”) and Securities and Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder, 17
 22 C.F.R. §240.10b-5.¹ Pursuant to the PSLRA, the Court must decide whether to consolidate the
 23 Related Actions prior to selecting a plaintiff to lead this litigation on behalf of the putative class. See

25 ¹ The PSLRA’s lead plaintiff provisions amended both the Securities Act and the Exchange Act in virtually
 26 identical ways. Compare 15 U.S.C. §77z-1(a)(3) with 15 U.S.C. §78u-4(a)(3). For simplicity and consistency, only the
 lead plaintiff provisions in the Exchange Act are cited herein.

1 15 U.S.C. §78u-4(a)(3)(B)(ii). As discussed below, the Related Actions should be consolidated
2 pursuant to Rule 42(a) because they each involve similar issues of law and fact.

The Mosco/Hardy Group should be appointed as lead plaintiff because it: (1) timely filed for appointment as lead plaintiff; (2) has the largest financial interest in this litigation of any proposed lead plaintiff of which it is aware; and (3) will fairly and adequately represent the interests of the class. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii). In addition, the Mosco/Hardy Group’s selection of Robbins Geller to serve as lead counsel and Hagens Berman to serve as liaison counsel should be approved. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). Robbins Geller possesses experience in the prosecution of securities class actions and will adequately represent the interests of all class members as lead counsel.

II. SUMMARY OF PENDING ACTIONS

Motricity provides mobile data solutions that enable wireless carriers to deliver mobile data services to their subscribers in the United States, the United Kingdom, the Netherlands, and Singapore.

15 During the Class Period, defendants issued materially false and misleading statements
16 regarding the Company’s business practices and financial results. Specifically, defendants failed to
17 disclose negative trends in Motricity’s business, including with Motricity’s most important
18 customers. As a result of defendants’ false statements, Motricity stock traded at artificially inflated
19 prices during the Class Period, reaching a high of \$30.74 per share on November 9, 2010.

On June 18, 2010, Motricity announced the pricing of its initial public offering (“IPO”) of 6 million shares of common stock at \$10 per share (which included 1 million shares to be purchased at the IPO price of \$10.00 per share, less the underwriting discount, by one or more entities affiliated with Carl C. Icahn – who had an existing 18.5% beneficial ownership interest in Motricity) with an overallotment option granted to the underwriters to purchase up to an additional 750,000 shares, for net proceeds of \$51.4 million.

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During the Class Period, defendants represented that the Company would continue to prosper despite the increasing popularity of smartphones, which provide Internet access without Motricity's services. In April 2011, the Company acquired Adenyo, a mobile marketing, advertising and analytics solutions provider with operations in the United States, Canada and France.

On May 3, 2011, Motricity issued a press release announcing its first quarter 2011 financial results. The Company reported a net loss of (\$6.1) million, or (\$0.15) diluted earnings per share (“EPS”), which included the Adenyo acquisition, and revenue of \$32.2 million.

On this news, Motricity's stock dropped \$1.82 per share to close at \$10.99 per share on May 4, 2011, a one-day decline of 14% on volume of over 4 million shares.

Then, on August 9, 2011, Motricity issued its second quarter 2011 financial results, reporting a net loss of (\$4.3) million, or (\$0.09) diluted EPS, including the expenses of the Adenyo acquisition, and revenue of \$34.6 million. This result fell well short of Wall Street's forecast. The release stated in part:

“Our financial results are below our expectations, due to headwinds in our North America carrier business, increased competition in the international market which impacted our ability to close new deals, and a later than expected closing of the Adenyo transaction. We are providing a greater level of revenue detail in this press release on the primary areas of our business – North American Carrier, International Carrier and Mobile Marketing and Advertising – so that investors can better understand our company,” said Ryan Wuerch, chief executive officer of Motricity.

“At the senior level of management, we are initiating a transition in the CFO position to replace Allyn Hebner, who will assist with the transition. We also made the decision to make another transition in our senior team with Jim Ryan, who has previously served as our Chief Strategy and Marketing and Development Officer and whose responsibilities are now being handled by others,” added Wuerch.

As a result of this news, Motricity's stock price plummeted, opening at \$2.26 per share on August 10, 2011, a decline of 50% on huge volume.

The true facts, which were known by the defendants but concealed from the investing public during the Class Period, were as follows:

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1 (a) Motricity's business was being adversely affected by a faster than expected
 2 adoption of smartphones by consumers such that a smaller portion of the market needed Motricity's
 3 services;

4 (b) Motricity's largest customers were not increasing their demand for Motricity's
 5 services to the extent represented; and

6 (c) Motricity's business was not growing as fast as represented, particularly
 7 domestically.

8 As a result of defendants' false statements, Motricity's stock traded at inflated levels during
 9 the Class Period. However, after the above revelations seeped into the market, the Company's
 10 shares were hammered by massive sales, sending them down over 92% from their Class Period high.

11 **III. ARGUMENT**

12 **A. This Court Should Consolidate These Related Actions to Promote 13 Efficiency**

14 Consolidation pursuant to Fed. R. Civ. P. 42(a) is proper when actions involve common
 15 questions of law and fact. *Sw. Marine, Inc. v. Triple a Machine Shop, Inc.*, 720 F. Supp. 805, 806
 16 (N.D. Cal. 1989). This Court has broad discretion under Rule 42(a) to consolidate cases pending
 17 within this District. *Investors Research Co. v. United States Dist. Court for Cent. Dist.*, 877 F.2d
 18 777 (9th Cir. 1989); *Steiner v. Aurora Foods Inc.*, No. C 00-602 CW, 2000 U.S. Dist. LEXIS 20341,
 19 at *7 (N.D. Cal. Jun. 5, 2000).

20 Courts have recognized that class action shareholder suits are particularly well suited to
 21 consolidation pursuant to Rule 42(a) because unification expedites pretrial proceedings, reduces case
 22 duplication, avoids the need to contact parties and witnesses for multiple proceedings and minimizes
 23 the expenditure of time and money for all parties involved. *See In re Equity Funding Corp. of Am.
 24 Sec. Litig.*, 416 F. Supp. 161, 176 (C.D. Cal. 1976). Consolidating multi-shareholder class action
 25 suits simplifies pretrial and discovery motions, class action issues and clerical and administrative
 26 management duties. Consolidation also reduces the confusion and delay that may result from
 prosecuting related class action cases separately. *See id.*

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1 The Related Actions pending before this Court present virtually identical factual and legal
 2 issues, alleging substantially the same violations against similar defendants. Because these Related
 3 Actions are based on the same facts and subject matter, relevant discovery will pertain to all
 4 lawsuits. Thus, consolidation is appropriate here.

5 The PSLRA provides, among other things, for consolidation of substantially similar actions.
 6 The PSLRA states, in pertinent part:

7 If more than one action on behalf of a class asserting substantially the same
 8 claim or claims arising under this chapter has been filed, and any party has sought to
 9 consolidate those actions for pretrial purposes or for trial, the court shall not make
 the determination [of appointment of lead plaintiff under §21D(a)(3)(B)] until after
 the decision on the motion to consolidate is rendered.

10 15 U.S.C. §78u-4(a)(3)(B)(ii).

11 Thus, the PSLRA establishes a two-step process for resolving lead plaintiff and consolidation
 12 issues where more than one action on behalf of a class asserting substantially the same claims has
 13 been filed. The court “shall” first decide the consolidation issue. The court shall then decide the
 14 lead plaintiff issue “[a]s soon as practicable.” *Id.*

15 The Mosco/Hardy Group respectfully requests that the Court consider consolidation as soon
 16 as practicable and consolidate these Related Actions under the lowest case number. A prompt
 17 determination is reasonable and warranted under Rule 42(a), given the common questions of fact and
 18 law presented by the Related Actions now pending in this District. *See, e.g., Steiner*, 2000 U.S. Dist.
 19 LEXIS 20341, at *7.

20 **B. The Mosco/Hardy Group Should Be Appointed Lead Plaintiff**

21 The PSLRA establishes the procedure for appointing a lead plaintiff in each private action
 22 arising that is brought as a plaintiff class action, pursuant to the Federal Rules of Civil Procedure. 15
 23 U.S.C. §78u-4(a)(3)(B)(i).

24 First, the plaintiff who files the initial action must publish a notice to the class within 20 days
 25 of filing the action informing class members of their right to file a motion for appointment as lead
 26 plaintiff. 15 U.S.C. §78u-4(a)(3)(A)(i). Here, the relevant notice was published on *Business Wire*

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1 on August 12, 2011. *See* Declaration of Karl P. Barth in Support of the Mosco/Hardy Group's
 2 Motion for Consolidation, Appointment as Lead Plaintiff and for Approval of Selection of Counsel
 3 ("Barth Decl."), Ex. A.² Within 60 days after publication of the notice, any person or group of
 4 persons who are members of the proposed class may apply to the court to be appointed as lead
 5 plaintiff, whether or not they have previously filed a complaint in the action. 15 U.S.C. §78u-
 6 4(a)(3)(A)(II).

7 Second, the PSLRA provides that within 90 days after publication of the notice, the court
 8 shall consider any motion made by a class member and shall appoint as lead plaintiff the member or
 9 members of the class that the court determines to be most capable of adequately representing the
 10 interests of class members. 15 U.S.C. §78u-4(a)(3)(B). In determining the "most adequate
 11 plaintiff," the PSLRA provides that:

12 [T]he court shall adopt a presumption that the most adequate plaintiff in any private
 13 action arising under this [Act] is the person or group of persons that –

14 (aa) has either filed the complaint or made a motion in response to a notice . . .;

15 (bb) in the determination of the court, has the largest financial interest in the relief
 16 sought by the class; and

17 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 18 Procedure.

19 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

20 **1. The Mosco/Hardy Group Has Timely Moved for Appointment
 21 as Lead Plaintiff**

22 All class members who are interested in moving for the appointment of lead plaintiff in this
 23 matter must do so by October 11, 2011. 15 U.S.C. §78u-4(a)(3)(A)(II). Pursuant to the provisions

24 ² The national news wire services have been recognized as suitable vehicles for meeting the statutory requirement
 25 that notice be published "in a widely circulated national business-oriented publication or wire service." *Greebel v. FTP
 Software*, 939 F. Supp. 57, 58 (D. Mass. 1996); *see Lax v. First Merchants Acceptance Corp.*, No. 97 C 2715, 1997 U.S.
 Dist. LEXIS 11866, at *2 (N.D. Ill. Aug. 6, 1997).

26 Unless otherwise noted, all emphasis is added and citations are omitted.

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1 of the PSLRA and within the requisite time frame after publication of the required notice (published
 2 on August 12, 2011), the Mosco/Hardy Group hereby moves this Court in a timely manner to be
 3 appointed lead plaintiff on behalf of all members of the class.

4 The Mosco/Hardy Group has duly signed and filed certifications stating its members have
 5 reviewed the allegations of the complaint and are willing to serve as a representative party on behalf
 6 of the class. *See* Barth Decl., Ex. B. In addition, the Mosco/Hardy Group submits with this Motion
 7 a joint declaration describing the members of the group and how they will work together to oversee
 8 this litigation going forward. *See Sabbagh v. Cell Therapeutics, Inc.*, No. C10-414MJP, 2010 U.S.
 9 Dist. LEXIS 93614, at *17-*18 (W.D. Wash. Aug. 2, 2010); Barth Decl., Ex. F.

10 **2. The Mosco/Hardy Group Has the Requisite Financial Interest
 in the Relief Sought by the Class**

11 During the Class Period the Mosco/Hardy Group suffered losses of approximately \$1.08
 12 million in connection with its purchases of Motricity securities during the Class Period. *See* Barth
 13 Decl., Exs. B, C. On information and belief, this represents the largest financial interest in the
 14 outcome of this litigation. *See In re Cavanaugh*, 306 F.3d 726, 730-32 (9th Cir. 2002).

15 **3. The Mosco/Hardy Group Otherwise Satisfies Rule 23**

16 In addition to possessing the largest financial interest in the outcome of the litigation, the lead
 17 plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil
 18 Procedure.” 15 U.S.C. §78u-4(a)(3)(B)(iii)(cc). Rule 23(a) provides that a party may serve as a
 19 class representative only if the following four requirements are satisfied: (1) the class is so numerous
 20 that joinder of all members is impracticable; (2) there are questions of law or fact common to the
 21 class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of
 22 the class; and (4) the representative parties will fairly and adequately protect the interests of the
 23 class. Of these four prerequisites, only two – typicality and adequacy – directly address the personal
 24 characteristics of the lead plaintiff movant. Consequently, in deciding a lead plaintiff motion, the
 25 court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer
 26

1 examination of the remaining requirements until a class certification motion is filed. *See In re Cree,*
 2 *Inc., Sec. Litig.*, 219 F.R.D. 369, 372 (M.D.N.C. 2003).

3 Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of
 4 those of the class. Typicality exists where the plaintiffs' claims arise from the same series of events
 5 and are based on the same legal theories as the claims of all the class members. *See In re Cendant*
 6 *Corp. Litig.*, 264 F.3d 201, 264-65 (3d Cir. 2001). Typicality does not require that there be no
 7 factual differences between the class representatives and the class members, because it is the
 8 generalized nature of the claims asserted which determines whether the class representatives are
 9 typical. *See Priest v. Zayre Corp.*, 118 F.R.D. 552, 555 (D. Mass. 1988) ("With respect to
 10 typicality under Rule 23(a)(3), plaintiffs need not show substantial identity between their claims and
 11 those of absent class members, but need only show that their claims arise from the same course of
 12 conduct that gave rise to the claims of the absent [class] members.'"). The Court should consider
 13 whether movant's circumstances "are markedly different or . . . the legal theory upon which the
 14 claims [of that movant] are based differs from that upon which the claims of other class members
 15 will perforce be based.'" *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988). The requirement that
 16 the proposed class representatives' claims be typical of the claims of the class does not mean,
 17 however, that the claims must be identical.

18 The Mosco/Hardy Group satisfies the typicality requirement of Rule 23 because, just like all
 19 other class members, it: (1) purchased Motricity securities during the Class Period at artificially
 20 inflated prices; and (2) suffered damages thereby. Thus, the Mosco/Hardy Group's claims are
 21 typical of those of other class members since its claims and the claims of other class members arise
 22 out of the same course of events.

23 Under Rule 23(a)(4) the representative party must also "fairly and adequately protect the
 24 interests of the class." The PSLRA directs the court to limit its inquiry of the movant's adequacy to
 25 represent the class to the following: (1) the absence of potential conflict between the proposed lead
 26

1 plaintiff and the class members; and (2) the class representatives' choice of counsel who is qualified,
 2 experienced and able to vigorously conduct the proposed litigation. *See Cree*, 219 F.R.D. at 372.

3 Here, the Mosco/Hardy Group is an adequate representative of the class because its interests
 4 in aggressively pursuing the claims against defendants are clearly aligned with the interests of the
 5 members of the class, who similarly suffered losses because of defendants' false statements to the
 6 market. There is no antagonism between the interests of the Mosco/Hardy Group and those of the
 7 other members of the class. In addition, as demonstrated below, the Mosco/Hardy Group's proposed
 8 counsel is highly qualified, experienced and able to conduct this complex litigation in a professional
 9 manner. Thus, the Mosco/Hardy Group *prima facie* satisfies the commonality, typicality and
 10 adequacy requirements of Rule 23 for the purposes of this Motion.

11 **C. The Mosco/Hardy Group's Selection of Counsel Should Be Approved**

12 Pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v), the lead plaintiff shall, subject to court approval,
 13 select and retain counsel to represent the class it seeks to represent. In that regard, the Mosco/Hardy
 14 Group, as the presumptively most adequate plaintiff, has selected Robbins Geller as lead counsel and
 15 Hagens Berman as liaison counsel, subject to this Court's approval. Robbins Geller is a 180-lawyer
 16 law firm that is actively engaged in complex litigation emphasizing securities, consumer and
 17 antitrust class actions. Robbins Geller possesses extensive experience litigating securities class
 18 actions and has successfully prosecuted numerous securities fraud class actions on behalf of injured
 19 investors. The firm's lawyers have been appointed as lead or co-lead counsel in landmark class
 20 actions, including *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998),
 21 where plaintiffs' recovery was the largest ever in an antitrust case, and *In re Enron Corp., Sec. Litig.*,
 22 206 F.R.D. 427 (S.D. Tex. 2002). Robbins Geller's securities department includes numerous trial
 23 attorneys and many former federal and state prosecutors, and utilizes an extensive group of in-house
 24 experts to aid in the prosecution of complex securities issues. Barth Decl., Ex. D.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Mosco/Hardy Group respectfully requests that this Court: (1)
3 consolidate the Related Actions pursuant to Fed. R. Civ. P. 42(a); (2) appoint the Mosco/Hardy
4 Group as Lead Plaintiff pursuant to §21D(a)(3)(B); and (3) approve its selection of Robbins Geller
5 as Lead Counsel and Hagens Berman as liaison counsel.

6 DATED: October 11, 2011

Respectfully submitted,

7 HAGENS BERMAN SOBOL SHAPIRO LLP
8 STEVE W. BERMAN, WSBA #12536
KARL P. BARTH, WSBA #22780

10 /s/ Karl P. Barth

11 KARL P. BARTH

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14 [Proposed] Liaison Counsel

15 ROBBINS GELLER RUDMAN
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16 JOHN K. GRANT
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19 ROBBINS GELLER RUDMAN
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21 655 West Broadway, Suite 1900
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22 Telephone: 619/231-1058
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23 [Proposed] Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who are registered ECF users.

DATED: October 11, 2011

s/ Karl P. Barth
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